

YCS CORPORATION BHD

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v.

**MARITIME CORPORATE PARK SDN BHD;
NORTHPORT CONTAINER TERMINAL
SDN BHD & ANOR (APPLICANTS)**

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HIGH COURT MALAYA, KUALA LUMPUR
HISHAMUDIN MOHD YUNUS J
[CIVIL SUIT NO: D1-28-784-2007]
17 NOVEMBER 2008

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CIVIL PROCEDURE: *Winding up - Suit against company - Application to proceed with civil action against wound up company - Whether necessary for plaintiff to first intervene in the winding up proceedings - Rules of the High Court 1980, O. 15 r. 6 - Companies Act 1965, s. 226*

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COMPANIES AND CORPORATIONS: *Winding up - Suit against company - Application to proceed with civil action against wound up company - Whether necessary for plaintiff to first intervene in the winding up proceedings - Rules of the High Court 1980, O. 15 r. 6 - Companies Act 1965, s. 226*

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The applicants had filed a civil suit against the respondent. Before the suit could be tried, the respondent was wound up through winding up proceedings brought by the petitioner. The applicants thus filed an application in the winding up proceedings pursuant to s. 226(3) of the Companies Act 1965 for leave to proceed with their suit against the respondent. However, the petitioner raised a preliminary objection arguing that the applicants should first file an application pursuant to O. 15 r. 6(2) and (3) of the RHC 1980 to intervene and be made parties to the winding up proceedings, before seeking the leave of court to proceed with their civil suit.

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Held (dismissing the preliminary objection with costs):

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- (1) There was no legal provision requiring the applicants to first intervene in the winding up proceedings pursuant to O. 15 r. 6 of the RHC 1980 before applying for leave under s. 226(3) of the Companies Act 1965. (para 6)

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- A (2) The applicants had no interest in the winding up proceedings. Their only interest was in their civil suit. There was no reason for them to intervene in the winding up proceedings. (para 6)
- B (3) The petitioner's argument was based on a misreading of O. 15 r. 6 of the RHC 1980. The purpose of s. 226(3) of the Companies Act 1965 also nullified the petitioner's argument that the applicants had first to intervene in the winding up proceedings. (paras 6 & 7)
- C **Legislation referred to:**
Companies Act 1965, s. 226(3)
Rules of the High Court 1980, O. 15 r. 6(2), (3)
- Other source(s) referred to:**
Loh Siew Cheang, *Corporate Powers Accountability*, 2nd edn, p 1280
- D *For the applicants - Gopi Seshadari (Michael Chow with him); M/s Vicknaraj, RD Ratnam, Rajesh Kumar & Assoc*
For the petitioner - K Kandiah (Puan Pushpam with him); M/s Mohd Latip & Assoc
- E *Reported by Andrew Christopher Simon*

JUDGMENT

- F **Hishamudin Mohd Yunus J:**
- G [1] Enclosure 31 is an application by the applicants pursuant to s. 226(3) of the Companies Act 1965 for leave of this court to continue with their action against the respondent in a civil suit in the Commercial Division Court, the case number being D8-22-812-2007 ('the D8 suit'). The applicants are the plaintiffs in that D8 suit, whilst the respondent in this petition is the 1st defendant in that action. The applicants' claim against the respondent in that suit is for the revocation of a power of attorney, and an injunction to restrain the respondent from doing any act pursuant to the power of attorney. What had happened was, while the D8 suit is yet to be tried, the respondent was wound up by this court *vide* the present petition on 24 January 2008.

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[2] Section 226(3) of the Companies Act reads:

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- (3) When a winding up order has been made or a provisional liquidator has been appointed no action or proceeding shall be proceeded with or commenced against the company except:

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(a) by leave of the Court; and

(b) in accordance with such terms as the Court imposes.

[3] At the commencement of the hearing of this application, the petitioner raised a preliminary objection. The preliminary objection is that the applicants, before making the present application, should have first applied to this court to intervene and be made a party pursuant to O. 15 r. 6(2) and (3) of the Rules of the High Court 1980 ('the RHC').

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[4] Order 15 r. 6 of the RHC reads:

Misjoinder and non-joinder of parties (O. 15 r. 6)

6(1) No cause or matter shall be defeated by reason of the misjoinder or nonjoinder of any party; and the Court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter.

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(2) At any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application:

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(a) order any person who has been improperly or unnecessarily made a party or who has for any reason ceased to be a proper or necessary party, to cease to be a party;

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(b) order any of the following persons to be added as a party, namely:

(i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, or

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- A (ii) any person between whom and any party to the cause
or matter there may exist a question or issue arising
out of or relating to or connected with any relief or
remedy claimed in the cause or matter which in the
opinion of the Court it would be just and convenient
B to determine as between him and that party as well as
between parties to the cause or matter;

but no person shall be added as a plaintiff without his
consent signified in writing or in such other manner as may
be authorised.

- C (3) An application by any person for an order under paragraph
(2) adding him as a party must, except with the leave of the
Court, be supported by an affidavit showing his interest in
the matters in dispute in the cause or matter or, as the case
may be, the question or issue to be determined as between
D him and any party to the cause or matter.

[5] I have dismissed the preliminary objection with costs.

- E [6] In my judgment there is no legal requirement that the
applicants must first intervene in the winding up proceeding
pursuant to O. 15 r. 6 of the RHC before they can apply for
leave under s. 226(3) of the Companies Act. There is no
procedural law requiring such a step to be taken. With respect,
O. 15 r. 6 does not support the petitioner's contention. In the
F context of the present application, this provision is clearly
irrelevant. With respect, the petitioner's argument is a misreading
of O. 15 r. 6. Why should the applicants in the present case be
required to intervene in the present winding up proceedings?
Clearly they have no interest in the winding up proceedings before
this court. Their interest is only in the D8 suit. They do not want
G to be a party in this winding up proceedings.

- H [7] The purpose of s. 226(3) also negates the argument that the
party seeking leave must first intervene in the winding up
proceedings. In *Corporate Powers Accountability* 2nd edn by Loh
Siew Cheang, the learned author (at p. 1280) has this to say on
the purpose of s. 226(3):

- I The statutory purpose behind s. 226(3) of the Act is not for the
purpose of impeding the claims of creditors but to save the
company from being burdened with costs if it were made to face
many suits. This might be to the detriment of the general body
of creditors as it has the effect of reducing the quantum of

available assets for distribution: *Chatib bin Kari v. Mosbert Bhd (In liquidation)* [1984] 2 MLJ 67; [1985] 1 MLJ 162, *Watta Industries Sdn Bhd v. Uni Batt Manufacturing Sdn Bhd* [1993] 1 MLJ 149, *Ogilvie-Grant & Anor v. East, liquidator of Gordon Grant Pty Ltd* [1982-83] 7 ACLR 669. It is for these reasons that leave of court is necessary and leave will only be given if it is right and fair to do so in all the circumstances of the case.

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